(8) (7)

Nos. 88-1671 and 88-1938

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR THE FEDERAL PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT P. DAVIS
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

89-7

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1671

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

No. 88-1688

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR THE FEDERAL PETITIONER

In our opening brief, we showed that under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court below erred in holding that the system for awarding black lung attorney's fees violates due process by denying claimants access to counsel. Respondent and

his amici, the Association of Trial Lawyers of America et al. (ATLA) and the United Mine Workers (UMW), disagree with each aspect of our analysis: they seek to diminish the government's interest in fee regulation; they contend that claimants have a surpassing interest in the benefits provided; and they insist that the presence of counsel is a virtual necessity for black lung cases and that changes to the fee system are needed to alleviate the shortage of counsel that they currently perceive. Neither respondent nor his amici, however, adequately show that a widespread shortage of attorneys exists, that any shortage can be attributed to the fee system, or that an attorney is an essential component of due process for a large majority of black lung claimants at all levels of the claims procedure.

1. As discussed in our opening brief (Br. 21-22), the black lung fee system implements the strong government interest in ensuring that the benefits paid to claimants are not depleted through improvident agreements with attorneys. The weight of the government's interest in protecting claimants against such depletion of benefits is well established. See *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985). Respondent does not seriously dispute that Congress has a strong interest in devising a benefits program that provides funds to eligible claimants, not their lawyers.[1] Instead, respondent contends (Br. 6-7) that the government's interest in protecting claimants in the black lung program does not deserve deference because, in his view, the fee system has the effect of depriving claimants of lawyers, with the result that claimants fail to win benefits.[2]

[1] The UMW, in its amicus brief, acknowledges (Br. 17) that the government has a legitimate interest in "protecting black lung claimants from overreaching attorneys," and agrees that Congress has validly sought "to protect miners from unethical lawyers" (Br. 7). Consequently, the UMW "does not support the complete elimination of all regulation of attorney's fees in connection with black lung disability litigation" (Br. 2). Unfortunately, the UMW fails to appreciate that many of the difficulties it perceives in the current system of fee regulation are inherent in any effort to regulate fees fairly (and provide due process to those who pay them). Compare *In re Snyder*, 472 U.S. 634, 636-637 (1985) (describing attorney's complaints about CJA fee system). This is particularly true in the context of a massive benefits program administered by an agency operating with limited resources. See U.S. Department of Labor, Employment Standards Admin., *Black Lung Benefits Act Annual Rep. on Admin. of the Act During Calendar Year 1987* 1-2 (1989) [hereinafter *1987 Annual Report*] (noting that during 1987, the Department of Labor received, and made initial administrative decisions on, 8,344 claims; 3,946 claims were forwarded to ALJs for hearing; 3,083 claims went to the Benefits Review Board; 1,763 fee petitions were processed; and approximately $3.1 million in attorney's fees was paid by the Trust Fund).

[2] Respondent also asserts (Br. 4) that little deference is owed to the Department of Labor's administration of the fee system because this case, unlike *Walters*, involves a challenge to a federal program "as applied." That argument is incorrect on several levels. First, as the Court in *Mathews* made clear, 424 U.S. at 349, procedures developed by the administrative agencies are entitled to deference. Second, the characterization of this case as involving solely an "as applied" challenge is somewhat misleading. The only way in which the court below considered the fee system "as applied" was in its discussion of whether the fee system discouraged counsel from handling black lung claims. In every other respect, the challenge was essentially a test of the fee system's facial validity: the court did not examine the ap-

Respondent's argument is not actually addressed to the weight of the government's interest in regulating fees; it addresses, instead, the asserted risk of error under the current fee system. The risk of an erroneous result, however, is a distinct consideration under *Mathews*. It is clear that the fee system advances the important goal of protecting claimants from overreaching fee agreements and ensures that benefits awards provide maximum value for the intended beneficiaries. Respondent cannot succeed in downplaying that interest simply by asserting that pursuing it may infringe on other goals of the black lung program. It is the function of the *Mathews* analysis to determine whether the compromise of such competing interests satisfies due process.[3]

Respondent also argues (Br. 7) that there is no need, through fee regulation, to protect responsible operators and the Trust Fund from excessive fees, because those parties can protect themselves. Respondent does not explain, however, how the payor of a claimant's fees could possibly protect itself without a system of regulation designed to provide a neutral forum for determining the "reasonable" fee it must pay. The government has a strong interest in ensuring that the party that must bear a claimant's attorney's fees—be it the Trust Fund or a responsible

plication of the system to any particular claim or class of cases.

[3] In passing, respondent contends (Br. 5) that since the black lung fee system dates only from 1972, its policy deserves less weight than the veterans' fee system considered in *Walters*, which had been embodied in statutes for 120 years. But the regulation of fees in the black lung statute traces its roots to the Longshore and Harbor Workers' Compensation Act, enacted in 1927. See Gov't Br. 27. It, too, reflects a longstanding congressional policy, deserving of deference.

operator—is neither overcharged nor made liable for fees that the statute does not authorize.[4] 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(a)).

Respondent and his amici do little to suggest an alternative to the current fee system, let alone one that would be compatible with the government's interests in protecting claimants and in establishing fair fee awards. Respondent appears to suggest (Br. 7) that there is no need at all for federal fee regulation, because state bar rules adequately protect claimants. This simply disagrees with the view of Congress that supplementary protection of claimants was warranted. Moreover, unlike the black lung fee system, state bar rules do not relieve a claimant from the payment of any fee in a contested case. Those rules cannot maximize the application of funds to the needs of claimants, as the black lung system is designed to do.

Neither respondent nor his amici embrace the suggestion of the court below that a fee multiplier be adopted to enhance compensation for attorneys. Indeed, the amicus brief filed by ATLA recognizes (Br. 7) that such a multiplier would be prohibitive (because of the low approval rate); ATLA also concedes that the legal authority to award across-the-board multipliers is doubtful. Instead, ATLA argues (Br. 3, 5, 7-8, 10) that a contingency fee would furnish a superior vehicle for the compensation of counsel.

[4] Amicus UMW points to the fact that fees are paid not by claimants, but by operators and the Trust Fund, and suggests that this means that the government's asserted interest in protecting claimants from excessive fees is a "red herring." Br. 17-18 n.10. That argument, however, ignores that the protection of claimants is accomplished precisely because fees are shifted to other parties in contested cases.

The contingent fee alternative, however, is less an argument grounded in the Due Process Clause than it is a policy argument more appropriately directed to Congress.

Most puzzling of all is the amicus brief of the UMW, which acknowledges that fee regulation is desirable (see note 1, *supra*), and strongly criticizes the current system, but offers no indication of how it would frame the system to accommodate the interests in protecting claimants while fairly shifting fees to other parties. It may be that there are aspects of the current administrative system that are "cumbersome" or "fraught with delay" (UMW Amicus Br. 2), but the failure of any party to identify an adequate alternative means to serve Congress's claimant-protection purpose underscores that changes to the current fee system would entail significant additional administrative costs. See Gov't Br. 25-28.

2. The principal focus of respondent's argument regarding the asserted risk of error under the current fee system (Br. 12-26) is a description of the hardships that a claimant could face in a "worst-case" analysis of the black lung claims process. Yet, to satisfy the "extraordinarily strong showing" that *Walters* requires to sustain a finding of unconstitutionality in a case like this, 473 U.S. at 326, respondent had to demonstrate not only that there was a widespread unavailability of attorneys for black lung claimants, but also that the fee system caused the unavailability, and that attorneys are necessary in order for claimants to have a fair chance to present their claims in the generality of cases. Respondent failed to make any of these showings.

a. We explained in our opening brief (Br. 29-30) that the affidavits and excerpted congressional testimony in the record below did not establish that attorneys are generally unavailable to black lung claimants. Respondent offers no defense of that record other than to list the materials on which the court relied and to assert that it "seems unmistakably clear" that "most attorneys in West Virginia are not willing to practice black lung law on a regular basis." Br. 26, 29. The fact remains, however, that the principal support for that claim consists of statements of five lawyers in West Virginia expressing their impression that it is true.[5]

Respondent unpersuasively counters (Br. 27) the Department of Labor's showing that 92% of claimants at the ALJ level had representatives by pointing to possible reasons for believing that figure to be "unduly optimistic." The burden to establish that the fee system is unconstitutional, however, rests heavily on the challenger to the system. Observing that the government's figures might not present the

[5] The affidavits themselves candidly state that they provide only the impressions of practicing attorneys about the availability of representation. See, *e.g.*, Br. in Opp. App. A18 (Cohen Afft.) (expressing "my belief that very few black lung claimants are now being represented in their black lung claims"); *id.* at A28 (Noone Afft.) (stating that "[t]he above is not empirical fact, but rather gut feeling from practicing black lung law"). Respondent and the amici place great reliance on the view that only about twelve attorneys regularly practice black lung law in West Virginia. Resp. Br. 26; UMW Br. 10-11; ATLA Br. 6 (citing Crandall Afft., Br. in Opp. App. A30). Without questioning the sincerity of the lone affiant cited for this proposition, we submit that a court cannot determine a critical fact bearing on the black lung fee system's constitutionality on so slender a reed as a single affidavit. In 1987, the Trust Fund paid claimants' attorney's fees to 50 attorneys having West Virginia addresses. R. 27 (DeMarce Afft.).

entire picture does not carry that burden. Although the Department's statistics do not purport comprehensively to address all representation questions, they do cast serious doubt on the contention, readily accepted by the court below, that there is such a shortage of lawyers that claimants are generally forced to do without counsel.[6] We acknowledge, of course, that some claimants are proceeding pro se; our disagreement with the court below and with respondent is over the proportion of claimants who are proceeding pro se, and the reasons why they are unrepresented.[7]

b. Respondent also fails to carry his burdon of demonstrating that the regulation of fees bears principal responsibility for any shortage of attorneys. Respondent points (Br. 8, 27-29) to "inordinate delays" in the system, and argues that those delays have discouraged most attorneys from practicing in the black lung field.[8] But neither respondent nor the amici dispute our assertion (Br. 35) that attorneys were generally available for claims adjudicated under pre-1981 law, despite signficant delays in adjudicating those claims. If we assume that there is a present shortage of lawyers, the inference to be drawn from the history of the program is that the determining factor in discouraging counsel is the low approval rate under the 1981 amendments, not simply delay.[9]

Respondent also asserts (Br. 8) that inadequacy of compensation is a factor deterring attorneys from handling black lung cases. Respondent fails to explain, however, why claims of inadequacy in the rate of payment cannot be addressed under the current

[6] The UMW's amicus brief (at 10, 15) attacks the Department's figures as "bogus" and "a sham," but backs up this unusually harsh language only with the speculation that some listed representatives may have abandoned representation before the proceedings concluded, and with the observation that the figures do not measure representation at the deputy commissioner level. Whether or not the statistics are definitive, the UMW's unsupported assertion (Br. 15) that "[c]ertainly, only a very small percentage [of claimants] secure a legal representative who will provide them with counsel through the many levels and years of appeal" is not a substitute for proof.

[7] Respondent (Br. 27) and the UMW (Br. 12-13) also rely on the observations of two commentators on the black lung field regarding the asserted prevalence of pro se claimants. See Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 727-728 (1989) [hereinafter *Current Issues*]. That article offers no estimate of the numbers or percentages of pro se claimants, and cites no authority in support of its observation that "more and more" claimants are unrepresented.

[8] The Department of Labor, of course, would prefer to eliminate all backlogs, and is working to do so. Even critics of the black lung program have acknowledged that delays are now being reduced. See *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 79 (1988) (Rep. Murphy).

[9] Even the attorney affidavits submitted to the court, which stressed the fee system as the source of discouragement about black lung cases, reflect that the declining approval rate was a factor as well. See, *e.g.*, Br. in Opp. App. A11 (Cohen Afft.) (listing reasons for restricting black lung practice as "restrictive changes in the law, the inefficient processing of claims by the Department of Labor, and the inability to get paid even in the cases in which I prevail"); *id.* at A24 (Muth Afft.) (attributing decreased attorney interest to the fee system as well as "significantly greater and more stringent requirements for eligibility of claimants as well as the sophistication of defense techniques [which] has resulted in much lower levels of claims allowance by the agency").

fee system, which provides for a "reasonable" attorney's fee. The hourly rates that form the basis of fee awards are assumed to reflect anticipated delays and the attorney's risk of loss. See Gov't Br. 32-34. If, in fact, the present standards for determining whether a fee is "reasonable" fail to achieve the statutory objective of sufficient compensation, the remedy is to be found in a proper application of the statute, not in the Due Process Clause.

c. Respondent's failure to show that attorneys are generally unavailable for black lung claimants, or that the fee system is responsible for the unavailability of counsel, are sufficient reasons for reversing the judgment below. Assuming that both of those points are established, however, there is a third deficiency in the court's analysis that requires reversal. Contrary to respondent's argument (Br. 12-26), there is no showing that in the "generality of cases" (*Walters*, 473 U.S. at 330), the black lung claims process cannot function fairly unless a claimant is represented by counsel.

In arguing that counsel is essential to ensure a fair hearing on a black lung claim, respondent relies (Br. 29-30) on this Court's cases involving criminal proceedings, see *Powell* v. *Alabama*, 287 U.S. 45 (1932), parental rights, see *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), and welfare termination proceedings, where the precise scope of the due process interest in retaining counsel was not squarely presented or analyzed, see *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970). Those cases, of course, do not hold that the presence of counsel is indispensable for a claimant in a disability proceeding. Likewise, none of the court of appeals cases cited by respondent (Br. 30-31) holds that there is an unqualified right to hire counsel in administrative matters.[10]

The teaching of *Walters* is that the due process interest in hiring counsel requires a particularized inquiry into the ability of a pro se claimant to obtain a fair hearing in a given class of cases. Despite the efforts of respondent (Br. 12-26) and amicus UMW (Br. 5, 18) to paint the entire black lung claims process as unalterably inhospitable to pro se claimants, that conclusion does not bear scrutiny. To begin with, there can be no credible assertion that every black

---

[10] Indeed, none of the cases cited by respondent has anything to do with fee regulation, and all but two preceded this Court's application of the Due Process Clause to right-to-counsel issues in *Walters*. See *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (addressing limitations on a federal employer's right to restrict its employees in communicating with counsel regarding anticipated lawsuit); *Indiana Planned Parenthood* v. *Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983) (holding that a minor seeking an abortion without parental notice has a right to appointed counsel); *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980) (holding that court order prohibiting counsel from consulting with a client during breaks and recesses in a trial infringed client's due process rights); *Gray* v. *New England Tel. & Tel.*, 792 F.2d 251, 257 (1st Cir. 1986) (holding that district court did not abuse its discretion in requiring a litigant to retain counsel within a reasonable period or proceed to trial pro se); *Anderson* v. *Sheppard*, 856 F.2d 741, 747-748 (6th Cir. 1988) (holding that district court abused its discretion in failing to grant a continuance for a reasonable period to enable litigant to retain substitute counsel); *Mosley* v. *St. Louis S.W. Ry.*, 634 F.2d 942, 945-946 (5th Cir.) (vacating settlement because EEOC denied plaintiff an opportunity to consult with counsel about proposed settlement), cert. denied, 452 U.S. 906 (1981).

lung case involves such inordinately complex issues, or such adversarial proceedings, that attorney assistance is needed to establish the claim. As we noted in our opening brief, the issues in black lung cases involve much medical judgment (Br. 42) and the procedures governing each level of adjudication within the Department of Labor recognize and seek to ameliorate any difficulties that pro se claimants may face (Br. 36-38). Fairly considered, the black lung program is a hybrid of formal and informal procedures.[11] While it is not as informal as veterans' benefits proceedings, it is a far cry from a criminal trial or other adversary proceeding in court.[12]

In arguing that claimants encounter unusual difficulties in black lung cases, respondent relies heavily (Br. 12-13) on the fact that the current claims approval rate is about 5% That reliance is misplaced. The low approval rate under current law reflects

[11] For instance, respondent admits (Br. 20) that the deputy commissioner level is intended to operate fairly informally, but goes on to note that many cases are appealed to ALJs. The Department of Labor, however, does not ask for hearings before an ALJ if the deputy commissioner awards benefits against the Trust Fund. See 20 C.F.R. 725.411.

[12] We noted in our opening brief (at 35-38) that deputy commissioners assist in getting the claimant a medical examination, ALJs ensure that a pro se claimant is capable of proceeding without counsel, and the Benefits Review Board independently reviews the record in pro se cases without requiring the filing of a brief. In addition, the UMW apparently assists its members in filing claims and in completing black lung forms. See Br. in Opp. App. A20-A21. Indeed, according to sources cited by respondent (Br. 14 n.14), as of April 1988 the UMW was handling claims of its dues-paying members, and two of three districts in West Virginia apparently still provide services. See also UMW Amicus Br. 14-15.

Congress's judgment that under the former provisions, the black lung program was paying a large number of claims that were not adequately justified by medical evidence.[13] See Gov't Br. 17-18. In 1981, however, Congress intended to "restor[e] [the black lung program] as a disability program, and no longer a pension program," and envisioned an approval rate of approximately 4%. 127 Cong. Rec. 31,978-31,979 (1981) (remarks of Sen. Nickles). The low approval rate, therefore, cannot be read as evidence that claimants must have lawyers. Respondent offers no comparative statistics that reliably suggest that pro se claimants fare worse than similarly situated claimants represented by counsel.[14]

[13] The General Accounting Office (GAO) documented, in reports to Congress, the manner in which prior law permitted the award of benefits without adequate medical evidence. See GAO, *Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (HRD-82-26) (1982), at 9 (in 84% of sample claims approved by the Department of Labor, there was "no medical evidence of disability or death from black lung or the medical evidence was inconclusive or conflicting"); GAO, *Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence of Disability* (HRD-80-81) (1980), at 8 (in 88.5% of sample claims approved by the Social Security Administration, "medical evidence was not adequate to establish disability or death from black lung"). See also Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *The Insolvency Problems of the Black Lung Disability Trust Fund* 5, 7 (Comm. Print 1981) [hereinafter *Insolvency Problems*] (describing liberalization of eligibility criteria in 1972 and 1977 amendments).

[14] As did the court below (Pet. App. 40a), respondent misconstrues (Br. 24) the Department of Labor's figures to establish that represented claimants win 2.5 times as often as pro se claimants. As we explained in our opening brief (at 44), given the small percentage of pro se claimants (8%),

Respondent devotes considerable energy to demonstrating (Br. 15, 18-23) that counsel can be useful in meeting deadlines, responding to adversaries, analyzing legal issues, and handling hearings. We do not dispute that counsel could assist with some aspects of the black lung process, or that some cases may present unusually difficult legal or factual issues.[15] The same was true, however, with regard to the veteran's benefits program considered in *Walters*. 473 U.S. at 330. A far stronger showing is needed to overcome, on constitutional grounds, Congress's policy choice to regulate the fees payable to a claimant's attorney in a disability program.

The court below made no effort to quantify how often special difficulties require the assistance of counsel to prevent error, preferring instead to rely on the general view that the black lung process is "complex" and "viciously adversarial." Pet. App. 22a. Respondent similarly avoids analysis of how often particular complexities occur, how likely it is that an attorney could prevent an erroneous denial, and how frequently the special procedures accorded pro se

---

a more likely explanation of the comparative rates is that the pro se claimants failed to attract lawyers because their cases were weaker.

[15] That is not to say that we agree with respondent's draconian description of the black lung claims process. For instance, respondent lays heavy emphasis (Br. 15) on the relatively short time limits imposed on claimants for some responses or requests, but the Department provides adequate notice to claimants of those deadlines (Gov't Br. 37). The governing rules also provide a one-year period to seek modification of a denied claim. See 33 U.S.C. 922 (1982 & Supp. V 1987); 20 C.F.R. 725.310.

claimants are inadequate to compensate for the absence of counsel. Absent such a showing, the invalidation of the fee system could be sustained only if the nature of the black lung program inherently requires counsel in the vast majority of cases. Such a stringent necessity for counsel, however, has not been established.[16]

3. The final factor is the private interest at stake. Respondent and ATLA recognize that this case, like *Mathews* and *Walters*, involves disability benefits, but nonetheless argue that the private interest should be equated with the compelling interest in welfare benefits noted in *Goldberg* v. *Kelly*, *supra*. Resp. Br. 9; ATLA Amicus Br. 12-13.[17] Respondent, however, offers no reason for the Court to depart from its evaluation of the same issue in *Walters*. Black lung benefits were not intended to ensure a minimum level of subsistence. Independent welfare programs exist, and are available to black lung claimants, to serve those needs. The interest in retaining disability benefits is not so strong as to require the across-the-board invalidation of the fee system, which would expose at least some claimants to depletion of their benefits by having to spend them on attorney's fees.

In addition to relying on the entitlement "property" interest of claimants, respondent invokes (Br.

---

[16] The UMW apparently would go further than simply requiring access to counsel and would insist on experienced specialists in black lung cases, because "black lungs claims do not lend themselves to occasional pro bono work by law firms." Br. 7. The Court rejected a similar assertion that specialists were needed for disability claims in *Walters*, 473 U.S. at 328.

[17] The UMW's amicus brief does not refer to this Court's decisions distinguishing between disability and welfare benefits, instead simply asserting that the private interest in black lung benefits is "considerable." Br. 18.

8) an asserted liberty interest of an individual to consult with counsel, and suggests that fee limitations "may" deny First Amendment rights. As we explained in our opening brief (at 46-47), the liberty interest in consulting counsel regarding an administrative claim does not add to the weight of the claimant's constitutional interest; the same may be said of the asserted First Amendment interest in consulting with counsel (an interest never before raised in this case). The Court in *Walters* rejected virtually the same First Amendment argument, finding it "inseparable from [the] due process claims." 473 U.S. at 335.[18] Again, there is no reason for a different analysis to govern here.

4. Respondent does not attempt to balance the *Mathews* factors; instead, he simply insists (Br. 32) that the fee system must give way in order to ensure that lawyers will become available to represent black lung claimants. We do not agree, however, that "vast numbers of meritorious claims" are being denied because of the attorney's fee system. *Ibid.* The black lung program was an unprecedented effort to create a benefits program for a single occupational disease that affected large numbers of people. *Insolvency Problems* at 3; *Current Issues* at 667. The program has provided benefits to literally hundreds of thousands of claimants. *1987 Annual Report* at 1-2. In establishing an attorney's fee system for that program, Congress had to reconcile conflicting goals and policies. Any system for regulating attorney's fees may draw claims that it discourages some lawyers

[18] See also *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973) (per curiam) (rejecting First Amendment challenge to filing fee charged for judicial review of welfare determination for same reasons given for rejecting similar due process challenge).

from participating. Compare *Randolph* v. *United States*, 274 F. Supp. 200 (M.D.N.C. 1967) (per curiam) (Social Security System), summarily aff'd, 389 U.S. 570 (1968). At the same time, fee regulation is a standard means in worker's compensation programs to protect claimants.[19] In the black lung benefits program, fee regulation provides that protection by guaranteeing that in contested cases, the responsible operator or the Trust Fund—not the claimant—will bear the prevailing claimant's fees.

Congress did not intend to preclude lawyers from the black lung process, and, in our view, there is no showing that such a result has occurred. While the interaction of the current low approval rate, backlogs, and the regulation of fees has generated understandable discontent among lawyers, such discontent falls far short of showing that the overall program denies due process to claimants because of the process for awarding attorney's fees.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the West Virginia Supreme Court of Appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

JANUARY 1990

[19] See 4 Larson, *Workmen's Compensation Law*, § 83.13(a), at 15-1300 (1989) (noting that every State regulates the payment of fees in worker's compensation cases).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 699